Filed 12/28/04 In re N.B. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re N.B. et al., Persons Coming Under the Juvenile Court Law.	B173088 (Los Angeles County Super. Ct. No. CK52808)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.B., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Steven L. Berman, Juvenile Court Referee. Affirmed in part and reversed in part with directions.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Aleen L. Langton and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

A.B. (Father) appeals from jurisdictional and dispositional orders of February 10, 2004, declaring his daughter, N.B. (born in Jan. 1999), and son, A.B., Jr. (A.J.) (born in July 2001), to be dependent children of the court due to Father's sexual and physical abuse of N.B., which was established by N.B.'s hearsay statements to various individuals. We reject Father's contentions that (1) the juvenile court's admission of, and reliance on, N.B.'s hearsay statements when she was unavailable to testify deprived him of his constitutional due process right to confrontation and (2) N.B.'s statements do not constitute substantial evidence to support the court's findings.

But, as conceded by the Department of Children and Family Services (DCFS), its failure to comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. §§ 1901 –1952) (hereinafter ICWA) requires that we reverse the orders and remand the matters with directions to the juvenile court to conduct further proceedings to establish compliance with the ICWA.

BACKGROUND

Father and Amanda B. (Mother) separated in late 2001 and became involved in a bitter custody battle and dissolution of marriage proceedings in the family law court. In January 2003, Mother had custody of the children and Father had visitation rights. A Child Custody Evaluation Report prepared for the family law case (Custody Report) before May 2003 stated that both parents had engaged in inappropriate behavior and acted unreasonably, impeding the children's sense of safety and well-being. The Custody Report also stated that Father admitted that he had to leave high school in 1992 after a complaint was made that he had made lewd phone calls to another student.

In January 2003, N.B. disclosed to her babysitter that Father had hit her with his hand and his fist and that "it really hurt." N.B. told her babysitter that Father did something else to her that hurt and that she did not like, but N.B. was scared and at that time did not want to tell the babysitter what Father did. A few days later, the babysitter asked N.B. if she wanted to talk about "her secret," and N.B. at first said no. After the babysitter told N.B. that she would not be in trouble, it was not her fault, and that "you

have to let me know what Daddy is doing so that [I, Mother and the maternal grandmother can] help make it all better," N.B. answered the babysitter's questions. The babysitter asked N.B. whether she thought about Father when she was not at his house, and N.B. said that she thinks about Father everyday and "[i]t just makes me so angry." The babysitter asked what happened at Father's house and N.B. said that Father puts N.B. and A.J. in their room for a long time. The babysitter asked whether Father touched her private parts, and N.B. nodded her head "yes." The babysitter asked N.B. to show her where, but N.B. shook her head like she was embarrassed, so the babysitter asked if she (the babysitter) pointed, would N.B. tell her. The babysitter then pointed to her vagina and said, "Front," and then her rectum and said, "Or back." N.B. said, "Back." N.B. also said that it hurt, that it happened in her bed, and that she told Father to stop, but he did not listen. N.B. said that she also told the paternal grandparents. Later that evening when the babysitter was giving N.B. her bath, the babysitter asked where Father touched her private parts, and N.B. pointed to her rectum.

On January 31, 2003, after N.B. disclosed the abuse to Mother, Mother brought N.B. to be examined at Edralin Pediatric Center, where a doctor and a nurse practitioner found no physical evidence of sexual abuse. Mother told the nurse that N.B. disclosed to Mother that Father hit her all over her body and that he touched her rectum with his fingers. The nurse's notes stated that Mother "is here in hopes that she can get written notes claiming suspected child abuse so that she can get Dad's visitation rights removed pending further investigation. She also wanted a recommendation for a good therapist for the children." Although the Edralin Pediatric Center referred the matter to DCFS, N.B. did not disclose sexual molestation to a DCFS investigator or to an interviewer at the Children's Center. By March 14, 2003, Father's visits with the children were monitored in the home of the paternal grandparents.

In March 2003, the Antelope Valley Children's Center performed an assessment of N.B. and reported that she displayed signs of posttraumatic stress and reactive attachment disorder and that she was "having nightmares, [was] hyper vigilant, and anxious." N.B. told the therapist that Father put his finger in her vagina and in her

rectum and that it made her sad that Father hurt her. According to the therapist, N.B. was very verbal once she became comfortable, but she was initially afraid to come into the room and wanted Mother to carry her. According to the therapist, N.B. felt anxiety at night and was worried about her father and what he did to her.

On March 31, 2003, DCFS received another referral after N.B. returned from a weekend visit with Father and told Mother that Father was still hitting her. Father, who denied all of the allegations, claimed that the sexual abuse allegations started when Mother's "alimony" ended. Although a forensic exam produced "no findings" of sexual abuse, the parents agreed in May 2003 to a voluntary family maintenance case plan that included domestic violence counseling, psychological evaluation, and parenting education. Mother was also to seek for herself regular psychiatric treatment and monitoring of psychotropic medications.

In April 2003, N.B. was interviewed at her school; she appeared to be happy and relaxed during the interview. N.B. did not disclose any abuse from either parent, but disclosed that when in trouble she got hit by both parents with a "small toy and a big toy." An April 2003 forensic physical and sexual abuse examination indicated normal findings.

In May 2003, Mother reported to the police that N.B. told her that Father with a webcam had photographed her naked. N.B. told a police officer that Father made her angry because he touched her in her private part with his finger, put his finger in her "bottom," and took pictures of her while she was naked. The author of the Custody Report also wrote that Father "reluctantly acknowledged exhibitionist sexual online behavior using a webcam. He initially tried to deny activities and said the computer didn't work, only when I approached the computer to check the browser did he acknowledge his behavior. [¶] . . . [W]hile adult sexuality is distinctly different than pedophile, these events are of concern because they indicate that the father crosses the line from fantasy used for sexual stimuli to activities involving others." Although the police investigated the matter in May 2003, no criminal charges were filed against Father.

In June 2003, Mother made another report to the police that N.B. had come home from a weekend visit with Father and was soiling herself and refusing to use the bathroom, which was unusual because N.B. was "potty trained." N.B. told Mother that Father "touched my butt." N.B. permitted Mother to look at her "private parts." Mother saw redness and swelling, so she brought N.B. to the hospital, where the doctor saw no redness or swelling or any evidence of penetration to either the anal or vaginal opening. N.B. told the police officer that Father had come into her room when everyone was asleep, took off her panties and "put his finger in my privacy," indicating the vaginal area, and that "[i]t hurt me really bad."

In April 2003, Mother began individual therapy. In August 2003, Mother and N.B. began group therapy and individual therapy sessions at the Children's Center of the Antelope Valley. By January 3, 2004, N.B. had attended 15 individual therapy sessions. The progress notes of N.B.'s therapist state that N.B. was able to communicate her feelings clearly and that N.B. appeared to have a good memory.

In August 2003, N.B. told her therapist that Father was not living with her because "he did bad things a long time ago." In September 2003, N.B. reported to her therapist that Father "is being nice now" and that a long time ago, Father had hit her and touched her "privacy." N.B. said that Father would not give Mother money and that Mother "wants to get money so that Mother can go to school." N.B. also said that people should go to jail when they do bad things, but that she did not want Father to go to jail; it was "gross" that Father touched her "privacy," and he was not supposed to do that; and N.B. told Father "no," but he did not stop.

According to an October 8, 2003 progress note of N.B.'s therapist, N.B. said that Father was "still being nice" to her, and that Father "still touches her private and she cries." On October 9, 2003, N.B.'s therapist reported to DCFS that N.B., pointing to her vagina, alleged that Father still touched her private parts with his finger and that he put his finger inside her "butt" while she was visiting with Father at the paternal grandparents' home. On October 9, N.B. told the children's social worker, Bosede Ojo,

that Father touched her private parts with his fingers and that she told him to stop, but he would not stop.

N.B. and A.J. were detained and placed with Mother on October 10, 2003, when N.B. also spoke to the police. During N.B.'s medical examination for unrelated matters on October 10, the doctor saw a bruise on N.B.'s upper right arm. The doctor asked what happened and N.B. responded that "Daddy did it." On October 10, social worker Andrew Long interviewed N.B. at the child's play corner in Mother's home. Mother was within earshot but not visible from the play corner. While making a punching motion with her fist, N.B. told him that Father hit her on the arm. N.B. also said that Father "hits me and he sticks himself in my prissy," and made a motion with her finger toward her crotch. Later that day, N.B. made similar statements to Long's supervisor at the DCFS office. The supervisor also saw a yellow and bluish colored bruise on N.B.'s arm.

On October 16, 2003, DCFS filed a petition to declare N.B. and A.J. dependents under Welfare and Institutions Code section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), (d) (sexual abuse), (i) (cruelty), and (j) (abuse of sibling) based on Father's physical and sexual abuse of N.B., his taking of nude photographs of N.B., and the failure of prior DCFS intervention and voluntary family maintenance services to resolve the family problems. (Unless otherwise specified, statutory references are to the Welf. & Inst. Code.)

At a detention hearing on October 16, 2003, the court ordered that father's monitored visits were not to take place at his residence and the paternal grandparents were not permitted to monitor the visits.

According to the November 18, 2003 jurisdiction and disposition report, Father denied all the allegations and denied that he bathed the children, changed their clothes, or took their pictures without their clothes on; the paternal grandparents always bathed and changed the children's clothes. Father said that Mother was coaching N.B. to say the abuse took place and that Mother said that she would "make his life hell." According to Father, N.B. hurt her arm on the edge of a table.

N.B. was present for the jurisdiction and disposition hearing on February 10, 2004. After the detention report and other records were admitted into evidence, the court stated that it was not going to admit the jurisdiction and disposition report because Bosede Ojo, the preparer of the report, was not yet present and available for cross-examination. Counsel for DCFS stated that DCFS would again seek to introduce the jurisdiction and disposition report after Ojo arrived in court, but meanwhile, DCFS would call N.B. as its witness. Counsel for N.B. asked that her testimony be taken in chambers because N.B. said that she would be afraid to testify in front of Father.

N.B.'s counsel made the following statement about what had occurred in chambers: "As I was explaining to N.B. that [counsel for DCFS] was going to begin to ask her questions, she became very distraught and cried for her mom and ran out of the room crying, and I was unable to calm her down. When she came out into the courtroom, her mother was also unable to calm her down. The only way [N.B.] said she would feel comfortable answering any questions was if she could sit with her mom. At this time I believe that [N.B.] is unavailable to testify as she is too emotionally distraught to be able to do that at this time." The juvenile court then found that N.B., who had just turned five years old, was unavailable to testify because of her age and her emotional state.

Counsel for Father then asked the juvenile court to exclude N.B.'s statements contained in the reports and records on the grounds that N.B. was coached, the statements were not trustworthy, and the unavailability of N.B. for cross-examination deprived him of his constitutional right of confrontation.[1] The court denied Father's request, stating

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[1] Father's counsel argued, "I recognize the fact that the social worker who prepared the jurisdiction-disposition report is now present, however, it's been Father's position that the child has been coached. She's not available to cross-examine. This is going to deny him a fundamental right, a constitutional right to at least confront his accuser. This is certainly not a case where there's any indicia of trustworthiness. This is in the middle of a custody battle. That's from the mother's own mouth. . . . We have statements by the minor certainly suggesting that — from the [Children's Center] — that she's mad at her daddy because daddy won't give her mommy money. These statements

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that "the law is clear that even if the minor is unavailable to testify because of an incident like this, the reports are still admissible. And there's been numerous people she's spoken to, not just the social workers, but the therapists. And, obviously, if there's a question of credibility, that doesn't go to admissibility, and the reports would still be admissible under the law."

Because the social worker was then present, the court, on DCFS's motion, admitted into evidence the jurisdiction and disposition report, subject to cross-examination. Father called Bosede Ojo and DCFS called Andrew Long as a rebuttal witness.

Ojo testified that she spoke with N.B. once in September and two times in October 2003. The interviews were in the kitchen of Mother's home; Mother was home but not in N.B.'s eyesight during the interview. During the first interview, A.J. would come in and out of the kitchen to try to play with N.B. At her first October visit, N.B. told her that Father had touched her again, and Ojo believed that the touching occurred a week or two previously. About the middle of October 2003, N.B. told her that Father touched her again "last week or few days. She wasn't sure." N.B. told Ojo that she knew the difference between the truth and a lie, but Ojo did not conduct any independent tests on the matter. Ojo considered N.B. to be credible but admitted that there were no other witnesses to the sexual abuse. Ojo also admitted that the entire family law case Custody Report was in the DCFS file, that she had read "some of it," but that the complete Custody Report was not attached to any DCFS report and she had not brought it to court.

Andrew Long testified that at the time of his first interview with N.B., when she told him of the sexual abuse, she motioned to her genitalia and referred to it as her

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taken into the totality do not equate to the level of indicia of trustworthiness. Father is going to respectfully ask the court not to consider any of these statements that she's made."

"prissy." During the interview, Long, who was wearing a white shirt, asked N.B. whether he would be telling the truth or a lie if he said he was wearing a blue shirt. N.B. said that his statement would be a lie. Long also held up a black pen and asked whether he was telling the truth or a lie if he said the pen were white, and N.B. said it was a lie.

After all parties had rested, Father argued that N.B.'s statements in the reports should be stricken because the case "has red flags all over it," the allegations before the court in October 2003 were the same allegations made in April and May, the police "would not touch this case," Ojo never made an independent evaluation to determine whether N.B. was credible, the progress notes from N.B.'s therapist indicated that N.B. was upset and angry with Father because of a financial argument between the parents, and the investigation by DCFS was "botched" and "one-sided" because DCFS cited only portions of the family law court Custody Report and did not seek to admit the entire Report.

The juvenile court sustained all allegations in the petition, finding that the children were dependents of the court pursuant to section 300, subdivisions (a), (b), (d), (i) and (j). The court also removed the children from the parents' custody, but permitted them to be placed with Mother. Both parents were ordered to participate in the case plan and to attend various counseling and parenting programs. Father was afforded monitored visits, but neither Mother nor the paternal grandparents were to monitor his visits.

The juvenile court explained its jurisdictional findings as follows: "Every time there's one of these custody issues in the family law case, there's always the specter that any allegations of child abuse or of sexual abuse is coached by one parent over the other. In a case like this it's made more difficult because the court can't determine the credibility of the child face-to-face because the child was unavailable to testify for whatever emotional reasons. However, that doesn't make the material that the child gave in the reports inadmissible because as the courts have found, you could never protect the child under those circumstances . . . . You'd never be able to use any evidence that's obtained outside of court. I guess the primary cases are [*In re Carmen O*. (1994) 28 Cal.App.4th 908 (*Carmen O.*)], and also [*In re Cindy L*. (1997) 17 Cal.4th 15 (*Cindy L.*)].

And what they do is they give a list of criteria for making a finding of reliability although they make it clear that the list is nonexhaustive. That means that there's many more things the court can look at beyond just the list. But they talk about the child's mental state, the child's use of terminology expected for the child's age, lack of motive to fabricate. And what they talk about in the *Cindy L*. case is that the child, quote, 'Loved her father. Had no wish to harm him,' unquote. So she had no motive to lie.

"In this case we do have a case where the child has told the investigators, [']I don't want my father to go to jail.['] Apparently, she loves the father. She just wants her father to stop hurting her. The other facts supporting reliability in the *Cindy L*. case [include] the repetition, the statement was spontaneous. It was repeated consistently to the two social workers and the police investigator. In this case it started with minor's statements to a baby-sitter, to the mother, to the therapist at the child center in Antelope Valley, to at least two social workers, to the police officers. And despite the fact that there are no physical findings — the court read the report — because there's no physical findings, they didn't do a further scan, but there seems to be a tremendous amount of indicia that the minor was telling the truth that this actually happened. [¶] . . . In one of the reports the father evidently inappropriately used a [webcam]. There was exhibitionist material he was using on the internet. . . . There was also the matter of lewd conduct by the father at a prior time. There were lewd phone calls. In fact, I guess Father was either expelled or suspended from high school for that. The fact that there's an allegation that the father was taking nude photographs of the child or the children seems to be corroborated by that [webcam] information.

"So the court finds that there's certainly substantial evidence. Whether or not this will go beyond a reasonable doubt, my own feeling is it probably would, and it probably would be enough for a criminal conviction, although, at that point you'd need the child to testify. This isn't a criminal court. This is a dependency court. There's statutes allowing the minor's hearsay statements to be used."

The juvenile court impliedly determined that N.B.'s statements were admissible under section 355, subdivision (c)(1)(B) as the hearsay statements of a minor under the

age of 12 who is the subject of the proceeding. The juvenile court found that the time, content and the circumstances of N.B.'s statements possessed sufficient indicia of reliability to be admissible. The court also necessarily found that Father had failed to establish that the statements were the product of fraud, deceit, or undue influence.[2]

Father appealed from the February 10, 2004 jurisdiction and disposition orders.

DISCUSSION

A. N.B.'s Hearsay Statements

The difficulties of proving child sexual abuse led our Supreme Court in *Cindy L.* to establish a hearsay exception for out-of-court statements of a child victim in dependency cases. This exception, known as the child dependency hearsay exception or the child dependency exception (*Cindy L.*, *supra*, 17 Cal.4th at p. 18), provides that "the out-of-court statements of children who are subject to juvenile dependency hearings pursuant to Welfare and Institutions Code section 300 may be admitted in that proceeding if the statements show particular indicia of reliability, if the statements are corroborated, and if interested parties have notice that the statements will be used. (*Cindy L.*, *supra*, 17 Cal.4th at p. 29.)" (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1231, fn. omitted (*Lucero L.*).) The nonexclusive list of indicia of reliability is: "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate." (*Lucero L.*, *supra*, 22 Cal.4th at p. 1239.)

Apart from the child dependency exception is the hearsay exception of section 355.[3] Consistent with the language of section 355, subdivision (b), "the hearsay

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[2] Father's appellate briefs do not challenge these express and implied findings.

[3] Section 355 provides in pertinent part: "(a) At the jurisdictional hearing, the court shall first consider only the question whether the minor is a person described by Section 300. Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the minor within the jurisdiction of the juvenile court is admissible and may be received in evidence. . . . [¶] (b) A social study prepared by the

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statements contained in social studies should be admissible even if they do not meet the requirements of the child dependency exception and even if the minor is incompetent to testify. . . . Furthermore, although subdivisions (c) and (d) limit the extent to which such social study hearsay evidence can be relied on exclusively, there is no limitation, except for fraud, deceit, or undue influence, on the admission of hearsay evidence." (*Lucero L.*, *supra*, 22 Cal.4th at pp. 1242–1243.)

Recognizing a potential constitutional due process problem inherent in relying solely on the out-of-court statements of a minor who is unavailable for cross-examination (*Lucero L.*, *supra*, 22 Cal.4th at pp. 1244–1245 [except where statute establishes

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petitioning agency, and hearsay evidence contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based, to the extent allowed by subdivisions (c) and (d). . . . [¶] (c)(1) If any party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless the petitioner establishes one or more of the following exceptions: [¶] (A) The hearsay evidence would be admissible in any civil or criminal proceeding under any statutory or decisional exception to the prohibition against hearsay. [¶] (B) The hearsay declarant is a minor under the age of 12 years who is the subject of the jurisdictional hearing. However, the hearsay statement of a minor under the age of 12 years shall not be admissible if the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence. [¶] (C) The hearsay declarant is a peace officer . . . , a health practitioner . . . , a social worker . . . , or a teacher . . . ."

Subdivision (d), which is not here relevant, deals with the rights of parties to subpoena witnesses and introduce evidence pertinent to the credibility of the hearsay declarant or the weight of the hearsay evidence.

In *Lucero L.*, the court defined social studies to include social worker's reports as well as other additional information reports furnished to the juvenile court in matters involving the custody, status, or welfare of a minor in a dependency proceeding. (*Lucero L.*, *supra*, 22 Cal.4th at p. 1233, fn. 2.)

reliability of hearsay evidence, it is insufficient to satisfy due process of law and uncorroborated hearsay does not constitute sufficient evidence]), the court in *Lucero L.* held that, the language of section 355 notwithstanding, due process requires that "the out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that 'the time, content and circumstances of the statement provide sufficient indicia of reliability.' (*Cindy L.*, *supra*, 17 Cal.4th at p. 29.)" (*Lucero L.*, *supra*, 22 Cal.4th at pp. 1247–1248.)[4]

Father argues that principles enunciated in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354] (*Crawford*)[5] involving a criminal defendant's

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[4] The Supreme Court in *Lucero L.* noted that the additional requirement of corroboration, a requirement of the child dependency hearsay exception, "is not mandated by due process" and "because section 355 specifically authorizes the admittance of and reliance on the hearsay statements of minors who are the subject of dependency proceedings without reference to corroboration, we conclude that corroboration is not necessary in this context." (*Lucero L.*, *supra*, 22 Cal.4th at pp. 1248–1249.)

[5] *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597, 100 S.Ct. 2531] (*Roberts*). *Roberts* "says that an unavailable witness's out-of-court statement may be admitted [without violating the Sixth Amendment's Confrontation Clause] so long as it has adequate indicia of reliability — *i.e.*, falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" (*Crawford*, *supra*, 124 S.Ct. at p. 1359.) In rejecting the *Roberts* reliability test, the Court in *Crawford* stated: "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." (*Crawford*, *supra*, 124 S.Ct. at p. 1370.) "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does

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rights under the Sixth Amendment confrontation clause alter the due process analysis of the admissibility of child victim hearsay statements in dependency proceedings, notwithstanding *Lucero L.* and notwithstanding the pronouncements by our Supreme Court that parents involved in dependency proceedings and criminal defendants are not similarly situated for purposes of the Fourteenth Amendment equal protection clause (*In re Sade C*. (1996) 13 Cal.4th 952, 991 (*Sade C.*)) and that the Sixth Amendment right of confrontation does not apply to parties in civil proceedings, including juvenile dependency proceedings (*In re Malinda S*. (1990) 51 Cal.3d 368, 383, fn. 16, 384 [express right of confrontation of Sixth Amendment confined to criminal defendants but parties in civil proceedings have due process right to cross-examine and confront witnesses]). He maintains that in light of *Crawford*, the "indicia of reliability" test is "no longer a constitutionally permissible criterion for excusing confrontation in state dependency proceedings" and that the juvenile court's admission of N.B.'s hearsay statements when she was unavailable for cross-examination deprived him of his Fourteenth Amendment due process right of confrontation. According to Father, *Crawford* seriously undermines *Cindy L*. and *Lucero L*. and their tests for admissibility of hearsay based on the juvenile court's assessment of indicia of reliability. Father's brief concludes that in light of "*Crawford*'s wholesale rejection of the constitutionality of the *Roberts*' test, section 355 and the child dependency hearsay exception can no longer

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Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Id*. at p. 1374.)

withstand constitutional scrutiny in the state dependency context under the due process principles that derive from the 14th Amendment."

Father fails to persuade us that *Crawford* applies to the juvenile court's evidentiary ruling in this case or that it affords a basis to question the analysis in *Cindy L.* or *Lucero L.* And "[h]istorical analyses of the arcane judicial rules concerning hearsay and competency that have developed over the centuries in cases involving adults, whether civil or criminal in nature, are of little assistance in proceedings designed only to determine how best to safeguard the welfare of children of extremely tender years. Such children may be totally incapable of treating with the abstractions that underlie testimonial competency, yet are quite capable of observing and reporting on specific events to which they are privy." (*In re Kailee B.* (1993) 18 Cal.App.4th 719, 725 (*Kailee B.*).)[6] Indeed, Father acknowledges that a determination of the Fourteenth Amendment due process issue in this case requires application of the three-part test in *Lassiter v. Department of Social Services* (1981) 452 U.S. 18 [68 L.Ed.2d 640, 101 S.Ct. 2153] (*Lassiter*).[7]

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[6] "The court in [*Kailee B.*] captured the practical difference between constitutional principles as applied to criminal cases versus those appropriate for dependency cases. In a criminal case the issue is the guilt of the defendant, whereas in a dependency case the subject is the well-being of the victim. Getting to the heart of the matter, the court commented that while it may be true that '"it is better that ten guilty persons escape, than that one innocent suffer" (4 Blackstone's Commentaries 358) . . . few, if any, would agree it is better that 10 pedophiles be permitted to continue molesting children than that 1 innocent parent be required to attend therapy sessions in order to discover why his infant daughter was falsely making such appalling accusations against him.'" (*Carmen O.*, *supra*, 28 Cal.App.4th at p. 922, fn. 7.)

[7] "In *Lassiter*, the court addressed the question whether an indigent parent has a right, under the Fourteenth Amendment's due process clause, to the assistance of trial counsel, appointed by the state, in a state-initiated proceeding on parental status. In conducting its analysis, it commenced with a 'presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.' [Citation.] It then 'evaluated' 'three elements' derived from *Mathews v.*

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Under *Lassiter*'s mode of analysis, we evaluate and balance the following three factors to determine whether the Fourteenth Amendment requires that N.B.'s hearsay testimony be excluded: "(1) the private interests at stake; (2) the state's interests involved; and (3) the risk that the absence of the procedures in question will lead to an erroneous resolution of the appeal." (*Sade C.*, *supra*, 13 Cal.4th at p. 987.)

The courts in *Kailee B.*, *supra*, 18 Cal.App.4th at pages 725–726, and *In re Dirk S.* (1993) 14 Cal.App.4th 1037 (*Dirk S.*) have rejected similar due process challenges to the admission of child victim hearsay statements in dependency cases. "[W]e note that '[d]ependency proceedings are civil in nature, designed not to prosecute a parent, *but to protect the child.*' In these proceedings, 'the paramount concern is the child's welfare.' (*In re Malinda S.*, *supra*, 51 Cal.3d at p. 384, italics added.) We further note that '[a]s a matter of constitutional principle, the United States Supreme Court has held that a state's compelling interest in protecting child victims of sex crimes from further trauma may in some instances outweigh the right of confrontation. (*Maryland v. Craig* (1990) 497 U.S. 836, 852 [111 L.Ed.2d 666, 683, 110 S.Ct. 3157] [upholding procedure of closed-circuit television testimony by child in criminal case].)' [Citation.]" (*Dirk S.*, *supra*, 14 Cal.App.4th at p. 1044.)

The foregoing authorities persuade us that a balancing of the *Lassiter* factors indicates that Father did not suffer a violation of his Fourteenth Amendment due process right of confrontation by the juvenile court's admission of N.B.'s statements in the social

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Eldridge (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 33–34, 96 S.Ct. 893], 'in deciding what due process requires' for fundamental fairness, specifically, 'the private interests at stake, the government's interest, and the risk that the procedures will lead to erroneous decisions.' [Citation.] . . . Although [the court in *Lassiter*] recognized the 'unique kind of deprivation' threatened in a matter involving parental status [citation], it proceeded to hold that the parent does not have the entitlement in question in every proceeding, but may be given one, to be determined in the first instance by the court in which the matter is pending subject to appellate review." (*Sade C.*, *supra*, 13 Cal.4th 952, 986–987.)

workers' reports. The state's "compelling" interest in the protection of the welfare of N.B. and A.J. and the children's "'liberty interest[s]' [citation] in a 'normal family home' [citation], . . . , or at least in a home that is 'stable' [citation]" (*Sade C.*, *supra*, 13 Cal.4th at p. 988), outweigh Father's "'liberty interest . . . in the care, custody, and management of' his child[ren]" (*id*. at p. 987). Further, Father's custody rights had already been curtailed by the family law court, and Father was entitled only to visitation rights. Because only visitation rights are at issue here, we conclude that the interests of the children and the state together more than outweigh Father's interest in visitation rights. The consequence of an erroneous determination here thus involves Father's visitation rights and not custody rights.

With respect to the third *Lassiter* factor involving the risk of an erroneous determination, Justice Chin's concurring opinion in *Lucero L*. pointed out that "[t]he state certainly has a strong 'interest in producing "an accurate and just resolution" of dependency proceedings.' [Citation.] But this observation cuts both ways. Although the parent has an interest in avoiding an erroneous finding of jurisdiction, the child — and, accordingly, the court — has at least as important an interest in avoiding erroneous findings of *no* jurisdiction. The Legislature has thoughtfully addressed this question; we should give effect to its solution. Children must be protected, too; they have rights, too." (*Lucero L.*, *supra*, 22 Cal.4th at p. 1257 (conc. opn. of Chin, J.).)

Under the circumstances of this case, the risk of an erroneous assertion of juvenile court jurisdiction was also lessened because there were multiple grounds for the assertion of jurisdiction, including the finding that Father physically abused N.B. by striking her arm and causing bruising, which bruising was observed by several other people, thus providing some corroboration for N.B.'s statements that Father hit her. Thus, the assertion of juvenile court jurisdiction was not based *solely* on N.B.'s hearsay statements.

For all of the above reasons, we conclude that the requirement of fundamental fairness in the due process clause of the Fourteenth Amendment does not compel the striking of N.B.'s statements from the reports. Having concluded that the admission of N.B.'s hearsay statements did not violate Father's constitutional due process rights and

that *Crawford* is inapplicable here, we need not address the issue of whether N.B.'s statements were testimonial or nontestimonial within the meaning of *Crawford*.

We also reject Father's challenge to the sufficiency of the evidence to support the jurisdictional findings. Father argues that the "sole reliance on [N.B's hearsay statements] no longer constitutes 'substantial' evidence on which to base a jurisdictional finding after *Crawford*." As stated, *Crawford* does not apply here. And "[o]nce credited, this evidence [child victim's hearsay statements] provided ample support for the juvenile court's finding of jurisdiction . . . and its dispositional order." (*Kailee B.*, *supra*, 18 Cal.App.4th at p. 726.)

B. Compliance with ICWA

At the October 2003 detention hearing, Father notified the court that his great grandfather was Seminole Indian, but Father was not registered. The paternal grandmother indicated that the family history was in Florida and Connecticut. In November 2003, the social worker began investigating Father's possible Indian heritage by contacting the paternal grandfather. DCFS noticed the Seminole Tribe of Florida, the Seminole Nation of Oklahoma, and the Bureau of Indian Affairs (BIA).

Father asserts, and DCFS concedes, that the notices did not comport with the ICWA because the information supplied on the notices was deficient, and in some cases, incorrectly entered on the forms. Because DCFS concedes lack of compliance with the notice requirements, we proceed to the issue of the proper disposition.

We reject Father's assertions that the lack of proper notice under the ICWA mandates vacation of the jurisdictional and dispositional orders and that on remand he is entitled to new adjudication and disposition hearings. Rather, we adopt the disposition of a conditional reversal as in *In re Elizabeth W*. (2004) 120 Cal.App.4th 900, 909. (See also *In re Nikki R*. (2003) 106 Cal.App.4th 844, 855–856; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254, 261; *In re Jonathan D*. (2001) 92 Cal.App.4th 105, 111–112.)

DISPOSITION

The jurisdictional and dispositional orders of February 10, 2004, are reversed and the cause is remanded to the juvenile court with directions to conduct such further proceedings as are necessary to establish full compliance with the notice requirements of the Indian Child Welfare Act (ICWA). After proper notice as required by the ICWA and if no response is received indicating that the minors are Indian children within the meaning of the ICWA, the jurisdictional and dispositional orders shall be immediately reinstated and further proceedings as are appropriate shall be conducted. If a tribe determines that the minors are Indian children within the meaning of the ICWA, the court shall proceed accordingly. In all other respects, the orders are affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

I concur:

SUZUKAWA, J.*

I concur in the judgment only.

VOGEL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.